Taat Yik Plantations Sdn Bhd v Pentadbir Tanah Hilir Perak & Ors

HIGH COURT (IPOH) — ORIGINATING MOTION NO 21–25 OF 1999
SU GEOK YIAM JC
21 SEPTEMBER 2000

Administrative Law *— Rules of natural justice — Audi alterem partem — Whether order of land administrator void for failure to give a right to be heard to the plaintiff — Creation of right of way on adjoining land*

Land Law *— Land Administrator's right of way — Creation — Land administrator's discretion in granting such right — Alternative route available — Whether land administrator had exercised his discretion properly in granting such right — Whether land administrator ought to have granted right of way — National Land Code s 390*

The plaintiff who is the registered owner of land GB 15994 Lot 1616 (Lot Baru 16412) ('the land') was dissatisfied with the creation of a collector's private right of way ('the right of way') dated 30 January 1999 over his land by the first defendant, the Land Administrator of Hilir Perak in favour of the third defendant whose land adjoins the plaintiff's land. The second defendant is at all material times a director and manager of the third defendant. Both the plaintiff's and the third defendant's lands comprise oil palm estates. The third defendant had applied to the first defendant under s 390 of the National Land Code 1965 ('the NLC') for the creation of the right of way in Form 28A in order to enable its vehicles to transport oil palm produce from its land to a public terminal once or twice a day. It was not disputed that Lot 2089 ('the third defendant's land') adjoins Sungei Perak and that the third defendant's boats had been using the river to transport the oil palm produce from its estate to the oil palm factory. The third defendant has said that there is sufficient evidence to show that the Sungei Perak is hazardous and therefore cannot be used as an alternative route. The plaintiff on the other hand disagreed on the ground that it, too, uses the Sungei Perak to transport its oil palm produce and there are others who also use the Sungei Perak to transport their produce.

Held:

(1) Bearing in mind the principle of inviolateness of land, it is clear from s 390(2) of the NLC that it is incumbent on the first defendant to either hold an enquiry or make such other investigation as he thinks appropriate upon receiving an application for a private right of way. In the absence of compelling evidence, the court was not satisfied that the Sungei Perak was not an alternative route in the sense that it was not possible, practical nor easily available to the third defendant. On the contrary the court was satisfied that it constituted an existing reasonable

alternative route and that the third defendant merely wanted the right of way because it was more convenient for its workers to transport its oil palm produce using lorries as a mode of transportation as opposed to using sampans which would require a different kind of skill to operate. The situation in the present case did not partake 'of gravity or cogent necessity'. The third defendant has failed to discharge this onus at the enquiry. In the absence of compelling evidence that the existing public terminal, which is Sungei Perak, is dangerous and therefore cannot rightfully be described as a public terminal, the first defendant was acting ultra vires s 390 of the NLC read together with ss 389(3) and 387 of the NLC when he made the order (see pp 746D–F, I–747A); *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 followed.

(2) Although the first defendant was entitled, in accordance with s 390 (2)(a) of the NLC, to endeavour to find and create a suitable right of way over the plaintiff's land for the benefit of the third defendant and in that process to abandon any plan if found to be unsuitable and to rely on another plan or other plans, the plaintiff should be given every opportunity to object and present its view before the proposed route in the plan is approved. After comparing the third plan with the plaintiff's plan, the court was of the view that the third plan involved the creation of an additional stretch of road which would involve the plaintiff having to concede a certain portion of its palm fields for the creation of the additional stretch and this was never dealt with by the first defendant at the enquiry including the question of compensation and, therefore, the said order should be set aside (see p 748B–D).

(3) The first defendant has misdirected himself as to what the term 'expedient for a private right of way to be created' means. He went on the assumption that all that was required to establish that term was the bare statement from the third defendant that Sungei Perak was a dangerous route because its sampan had capsized twice causing its produce to fall into the river and endangering the lives of its captains and workers. The failure to give detailed reasons in this case also renders the said order suspicious and, therefore, bad because there were three different versions which were advanced as to why the said order was made (see p 749E–F); *Liew Peck Lian & Ors v The Conservator of Forests, Johor* [1961] MLJ 117 followed.

(4) Having considered the unchallenged evidence that the enquiry which had commenced on 30 September 1998 had ended on 15 October 1998 and the first defendant had cancelled the second plan which had formed the basis of the enquiry, the court was of the opinion that the enquiry should have been reopened or a new enquiry held to enable the plaintiff to give its views on the

proposed route as set out in the third plan before the first defendant made the final order. The failure to do so constituted a breach of one of the rules of natural justice, that is, the right to be heard and the order was bad because the plaintiff was not given a fair hearing (see p 751D–F).

[**Bahasa Malaysia summary**

Plaintif adalah pemilik berdaftar sebidang tanah BG 15994 Lot 1616 (Lot Baru 16412) ('tanah tersebut') yang tidak berpuas hati dengan pembentukan satu hak lalu-lalang persendirian pemungut ('hak lalu-lalang') bertarikh 30 Januari 1999 ke atas tanah beliau oleh defendan pertama, Pentadbir Tanah Hilir Perak yang menyebelahi defendan ketiga yang mempunyai tanah yang bersempadan dengan tanah plaintif. Defendan kedua adalah pada setiap masa matan pengarah dan pengurus kepada defendan ketiga. Kedua-dua bidang tanah plaintif dan defendan ketiga terdiri daripada estet-estet kelapa sawit. Defendan ketiga telah memohon kepada defendan pertama di bawah s 390 Kanun Tanah Negara 1965 ('KTN tersebut') untuk pembentukan satu hak lalu-lalang dalam Borang 28A bagi membolehkan kenderaan-kenderaannya membawa hasil kelapa sawit daripada tanahnya kepada satu terminal awam sekali atau dua kali sehari. Adalah tidak dipertikaikan bahawa Lot 2089 ('tanah defendan ketiga') bersempadan dengan Sungei Perak dan bahawa bot-bot defendan ketiga telah menggunakan jalan sungai untuk membawa hasil kelapa sawit daripada estetnya kepada kilang kelapa sawit. Defendan ketiga telah mengatakan bahawa terdapat keterangan yang mencukupi untuk menunjukkan bahawa Sungei Perak adalah berbahaya dan oleh itu tidak boleh digunakan sebagai jalan alternatif. Plaintif sebaliknya tidak bersetuju atas alasan bahawa ia, juga, menggunakan Sungei Perak untuk membawa hasil kelapa sawitnya dan ada juga yang lain yang menggunakan Sungei Perak untuk mengangkut hasil mereka.

Diputuskan:

(1) Dengan mengambilkira prinsip tdak mencemarkan tanah, adalah jelas daripada s 390(2) KTN tersebut bahawa ia adalah kewajipan defendan pertama untuk sama ada mengadakan satu siasatan atau membuat apa-apa siasatan lain yang beliau fikirkan patut tatkala menerima permohonan untuk satu hak lalu-lalang persendirian. Dengan ketiadaan keterangan yang mendorong, mahkamah tidak berpuas hati bahawa Sungei Perak bukan satu jalan alternatif dalam maksud bahawa ia adalah tidak mungkin, praktikal maupun senang digunakan kepada defendan ketiga. Sebaliknya mahkamah berpuas hati bahawa ia membentuk satu jalan alternatif yang sedia ada yang munasabah dan bahawa defendan ketiga hanya mahukan hak lalu-lalang kerana ia adalah lebih

senang untuk pekerja-pekerjanya untuk membawa hasil kelapa sawitnya dengan menggunakan lori sebagai satu cara pengangkutan jika dibandingkan dengan menggunakan sampan yang akan menghendaki kepakaran tersendiri untuk pengendalian. Keadaan di dalam kes ini tidak turut serta dalam 'graviti atau keperluan yang meyakinkan'. Defendan ketiga gagal untuk menunjukkan beban ini semasa siasatan. Dengan ketiadaan keterangan yang mendorong bahawa terminal awam yang sedia ada iaitu Sungei Perak, adalah berbahaya dan oleh itu tidak boleh dengan betulnya ditakrifkan sebagai satu terminal awam, defendan pertama telah bertindak ultra vires s 390 KTN tersebut dibaca bersama ss 389(3) dan 387 KTN tersebut apabila beliau membuat perintah tersebut (lihat ms 746D–F, I–747A); *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 diikut.

(2) Walaupun defendan pertama berhak, menurut s 390(2)(a) KTN tersebut, untuk berusaha untuk mencari dan membentuk satu hak lalu-lalang yang sesuai atas tanah plaintif untuk faedah defendan ketiga dan di dalam proses tersebut membiarkan apa-apa pelan jika mendapati ia tidak sesuai dan untuk bergantung kepada pelan lain atau lain-lain pelan, plaintif hendaklah diberikan setiap peluang yang ada untuk membantah dan mengemukakan pandangannya sebelum jalan yang dicadangkan di dalam pelan tersebut diluluskan. Setelah membandingkan pelan ketiga dengan pelan plaintif, mahkamah berpandangan bahawa pelan ketiga melibatkan pembentukan satu tambahan jalan yang akan menyebabkan plaintif menyerahkan sebahagian daripada ladang sawitnya untuk pembentukan jalan tambahan tersebut dan ini tidak pernah dibincangkan oleh defendan pertama dalam siasatan termasuklah persoalan mengenai pampasan dan, oleh itu, perintah tersebut hendaklah diketepikan (lihat ms 748B–D).

(3) Defendan pertma telah dengan sendirinya salah arah terhadap apa maksud terma 'wajar untuk satu hak lalu-lalang persendirian dibentuk'. Beliau beranggapan bahawa apa yang dihendaki untuk memenuhi maksud terma tersebut adalah penyataan yang sebenarnya daripada defendan ketiga bahawa Sungei Perak adalah satu jalan berbahaya kerana sampannya telah terbalik dua kali menyebabkan hasil kutipannya jatuh ke dalam sungai dan membahayakan nyawa kaptan dan pekerja-pekerjanya. Kegagalan untuk memberikan sebab-sebab terperinci di dalam kes ini juga akan menyebabkan perintah tersebut sebagai satu yang menimbulkan kesangsian dan, oleh itu tidak baik kerana terdapat tiga versi berbeza yang telah dikemukakan berhubung kenapa perintah tersebut dibuat (lihat ms 749E–F); *Liew Peck Lian & Ors v The Conservator of Forests, Johor* [1961] MLJ 117 diikut.

(4) Setelah mempertimbangkan keterangan yang tidak dicabar bahawa siasatan yang bermula pada 30 September 1998 telah

berakhir pada 15 Oktober 1998 dan defendan pertama telah membatalkan pelan kedua yang telah membentuk asas siasatan, mahkamah berpendapat bahawa siasatan tersebut hendaklah dibuka semula atau satu siasatan batu diadakan untuk membolehkan plaintif memberikan pandangannya berhubung jalan yang dicadangkan sebagaimana yang dilampirkan di dalam pelan ketiga sebelum defendan pertama membuat perintah yang muktamad. Kegagalan untuk berbuat demikian telah membentuk satu pelanggaran salah satu daripada peraturan keadilan asasi, iaitu, hak untuk didengar dan peritah tersebut adalah tidak baik kerana plaintif tidak diberikan satu perbicaraan yang adil (lihat ms 751D–F).]

Notes

For cases on land administrator's right of way generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2198–2200.

For cases on rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 557–622.

Cases referred to

Che Nik bte Bakar v Pentadbir Tanah, Kuala Krai [1997] 5 MLJ 516 (refd)

Liew Peck Lian & Ors v The Conservator of Forests, Johor [1961] MLJ 117 (folld)

Liow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors [1998] 1 MLJ 79 (refd)

Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors [1987] 1 MLJ 147 (folld)

Vadivelu a/l Palanisamy v M Radhakrishnan [1996] 1 CLJ 224 (refd)

Legislation referred to

National Land Code 1965 ss 387, 390(2)(a), (3), Form 28A

John Concisom (*Concisom & Co*) for the plaintiff.

Mohd Jazamuddin bin Hj Ahmad Nawawi (Assistant Legal Adviser, Perak) for the first defendant.

S Ravichandaran (*S Ravichandaran & Assoc*) for the second and third defendant.

Su Geok Yiam JC. : This appeal concerns a notice of motion (encl 1) which was filed by the plaintiff, Taat Yik Plantations Sdn Bhd against the three defendants, namely, Pentadbir Tanah Hilir Perak, Ong Chong Ann @ Ong Poh Ann and Thong Ree Brothers Sdn Bhd.

The plaintiff, who is the registered owner of land GB 15994, Lot 1616 (Lot Baru 16412) ('the land'), is dissatisfied with the creation of a collector's private right of way ('the right of way') dated 30 January 1999

over his land by the first defendant who is the land administrator, Hilir Perak in favour of the third defendant whose land adjoins the plaintiff's land. The second defendant is at all material times a director and manager of the third defendant. Both the plaintiff's and the third defendant's lands comprise oil palm estates.

The third defendant had applied to the first defendant under s 390 of the National Land Code 1965 ('the NLC') for the creation of the right of way in Form 28A in order to enable its four big wheeled lorries or six small wheeled lorries to transport oil palm produce from its land to a public terminal once or twice a day. In accordance with the provisions of s 390(2) the first defendant held an enquiry on 30 September 1998 and 15 October 1998. On 30 January 1999 he made the order creating the right of way ('the order').

The first defendant has said in the order that after holding the enquiry, he was satisfied that it was expedient for a private right of way to be created over the plaintiff's land in accordance with the third plan. The important words to note in s 390(3) of the NLC are 'he is satisfied that it is expedient for a private … right of way to be created'. the order is in the following terms:

> PERINTAH
> Saya, Abdul Manap bin Ismail, PPTD Hilir Perak telah membuat siasatan dan mendengar kedua-dua pihak dan saya berpuashati dengan keterangan yang diberi oleh mereka. Oleh yang demikian, dengan ini saya memerintahkan seperti berikut:
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> 1 Satu haklalu lalang 'laluan' diluluskan di atas tanah hakmilik bernombor G 37845 di atas Lot 1616 (lot baru 16412). Kedudukan laluan adalah seperti yang bertanda warna kuning (Pelan rujukan ialah pelan bertanda 24A).
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> 2 Pemohon iaitu Syarikat Thong Ree Brothers Sdn Bhd dikehendaki membayar sejumlah RM25,000 (Ringgit Malaysia: Dua Puluh Lima Ribu Sahaja) kepada tuan tanah, iaitu, Taat Yik Plantation Sdn Bhd sebagai balasan ganti rugi kos yang ditanggung oleh tuan tanah semasa pembinaan laluan jalan tersebut pada masa yang lepas.
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> 3 Mana-mana laluan jalan yang diluluskan masih belum wujud, pihak pemohon dibenarkan mewujudkannya, iaitu dengan membinanya dan segala kos ditanggung oleh pemohon.
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> 4 Tuan tanah dilarang menghalang pemohon menggunakan laluan tersebut, iaitu, dengan menggunakan kenderaaan lori empat tayar dan lori enam tayar kecil dan tiada lagi sekatan atau halangan dikenakan kepada pemohon.
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> 5 Sebarang kerosakan laluan 'hak lalu lalang' tersebut yang berlaku selepas diluluskan dan permohon ada menggunakannya, adalah dikehendaki ditanggung bersama antara permohon dan tuan tanah. Sebarang kerosakan melibatkan kos adalah dikehendaki dibiayai bersama antara tuan tanah dan pemohon.
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> 6 Pemohon dikehendaki membina titi kelubung antara sempadan tanahnya dan pemilik tuan tanah dan kos pembiayaannya adalah ditanggung oleh pemohon.

7 Sebarang bayaran ukur yang akan dikenakan oleh Jabatan Ukur akan datang adalah ditanggung oleh pemohon dan jumlahnya akan dimaklumkan oleh Jabatan Ukur kelak.

8 Kedudukan panjang hak lalu lalang yang diluluskan ialah 87 rantai dan lebar ialah 10 kaki. Lokasi kedudukannya ialah seperti pelan rujukan bertanda 24A).

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Abdul Manap bin Ismail
30 Januari 1999

The plaintiff has set out 11 grounds in its notice of motion why the order should be set aside.

In the opinion of the court, the only issues which merited consideration were as follows:

(a) who was the applicant for the right of way?

(b) whether there was already in existence an alternative right of way?

(c) whether the undisputed fact that three plans were given to the plaintiff, one after the other, by the first defendant showed that the three defendants were acting in concert to force the right of way upon the plaintiff?

(d) whether the failure of the first defendant to give his grounds for the making of the order rendered the order suspicious and, therefore, bad?

(e) whether the first defendant had failed to take relevant matters into consideration and in the process failed to exercise his discretion properly?

(f) whether the first defendant had failed to observe the rules of natural justice by not giving the plaintiff a right to be heard when he failed to ask the plaintiff for its views about the proposed route as set out in the order before making the order?

First issue: Who was the applicant?

The plaintiff said that the applicant was the second defendant. The first defendant said that the third defendant was the applicant. In the opinion of the court, this confusion has arisen because it was recorded in the notes of the enquiry which was held on 30 September 1998 that the second defendant was the applicant for the right of way and that the second defendant was the owner of the land known as Lot 2089.

However, after examining the first defendant's affidavit in reply (encl 7), the two Forms 28A which were exhibited therein as 'AMI-1' and 'AMI-2' and the affidavit in reply of the second and third defendant (encl 11), the court was of the view that the applicant was none other than the third defendant who was also the registered owner of Lot 2089.

Second issue: Whether there was already in existence an alternative right of way?

It was not disputed that Lot 2089 ('the third defendant's land') adjoins a river, namely, Sungei Perak and that the third defendant's boats had been

using this river to transport the oil palm produce from its estate to the oil palm factory. The river can be clearly seen in all the three plans.

However, according to the third defendant in its affidavit in reply (encl 11) the route via the Sungei Perak carries high risks and the use of the route endangers the lives of the captains of the third defendant's boats because on one occasion, a sampan had capsized.

The third defendant has said that there is sufficient evidence to show that the Sungei Perak is hazardous and therefore cannot be used as an alternative route. The plaintiff, on the other hand, disagreed on the ground that it, too, uses the Sungei Perak to transport its oil palm produce and there are others who also use the Sungei Perak to transport their produce and also to transport themselves.

The learned defendant's counsel has relied on the case of *Che Nik bte Bakar v Pentadbir Tanah, Kuala Krai* [1997] 5 MLJ 516 which concerns the creation of a public right of way under s 390(3) of the NLC in support of his contention that the Sungei Perak is not an alternative route. In that case, Nik Hashim JC (as he then was) had held that the road reserve was not an alternative route because it was not practical as it was still a hilly jungle and it was a road reserve only on paper.

The learned plaintiff's counsel has, in turn, relied on the case of *Liow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79 where it was held that where there is an alternative right of way, the grant of a right of way is a wrongful exercise of discretion in order to support his contention that just because a sampan had capsized on two occasions did not provide justification for the first defendant to grant the right of way to the third defendant.

Section 390 of the NLC provides as follows:

> (1) The State Authority or the proprietor or occupier of any alienated country land may apply to the Land Administrator in Form 28A for the creation of a private right of way.
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> (2) The Land Administrator, where —
>
> (a) he receives an application for a private right of way; or
>
> (b) he is of the opinion that the creation of a public right of way is or might be expedient,
>
> shall either hold an enquiry or make such other investigation as he thinks appropriate.
>
> (3) The Land Administrator, if on holding an enquiry or making an investigation he is satisfied that it is expedient for a private or public right of way to be created, shall make an order creating the right of way.
>
> (4) An order made under sub-s (3) shall —
>
> (a) describe sufficiently for purposes of identification—
>
> (i) the land and the public terminal between which the right of way is to run; and
>
> (ii) the route of the right of way;
>
> (b) state whether or not those using the right of way may pass and repass with animals and vehicles; and

(c) contain such conditions and limitations (if any) as the Land Administrator thinks appropriate. A

As early as 1961, Adams J in *Liew Peck Lian & Ors v The Conservator of Forests, Johor* [1961] MLJ 117 had held that it must be a condition precedent to the grant by a collector of a right of way over alienated land that 'a very good reason exists for so granting'. At p 118, he said as follows: B

> Before a right of way can be granted under these provisions, the Collector must satisfy himself that access is not otherwise reasonably available and 'reasonably' here certainly does not mean 'conveniently'. I think it is necessary to bear this in mind. The Collector must look at all the circumstances. He must consider whether the alternative routes, if any, are at all practical. This does not mean that they must necessarily be the cheapest, or most convenient. C

In 1987, Peh Swee Chin J (as he then was) considered *Liew Peck Lian*'s case in *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147. At p 152, he said as follows:

> ..., it is my view that when a Collector is satisfied that it is expedient, it is tantamount to this, that he should then act or exercise his discretion properly and reasonably, in all cases, save in exceptional circumstances where such departure from such propriety or reasonableness can be made. D

and he continued to say at the same page, as follows:

> Any authority that is conferred on a public official to grant a right of way against a landowner for the benefit of another has to be exercised ... for a proper purpose and reasonably unless exceptional circumstances exist. E

In 1996, in *Vadivelu a/l Palanisamy v M Radhakrishnan* [1996] 1 CLJ 224, Abdul Hamid Embong JC (as he then was) also held that the existence of alternative routes must be a factor to be taken into account by the land administrator when deciding whether to create a right of way or not. F

Both *Liew Peck Lian* and *Si Rusa* cases were considered by Nik Hashim JC (as he then was) in *Che Nik*'s case. His Lordship distinguished the two cases from *Che Nik*'s case on the ground that there were in fact alternative routes in the two cases as opposed to *Che Nik*'s case. He then went on to examine the facts in *Che Nik*'s case in order to see whether the decision of the land administrator was correct in law and in fact. Having done that, he concluded as follows at pp 521–522: G

> I am ... satisfied with his finding that there was no alternative route in this case. The so-called reserved road, and probably the same road referred to by Awang bin Da as 'jalan lencongan ke Lot 864', is not yet a road in the sense that it is practical and readily available for use by the public. It is still a jungle, sloppy and hilly. It is, therefore, not reasonable, in my view to treat the road reserve as an alternative route to the road. Unlike in *Liew Peck Lian* and *Si Rusa Inn*, there is no alternative route in this case. H
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> In the absence of an alternative route, there is thus an urgent public necessity for the land administrator to grant a public right of way across the appellant's land, even though it is against the principle of inviolateness of land. I

In the present appeal, it was recorded in the notes of the enquiry as follows:

> Pemohon memberitahu sekarang beliau menggunakan laluan lain, iaitu laluan sungai dengan pengangkutan sampan. Pemohon memberitahu beliau tidak akan lagi menggunakan laluan sungai selama-lamanya kerana keadaan merbahaya dan pernah kemalangan sampan terbalik dua kali dan hasilnya tenggelam tidak boleh diperolehi lagi dan pekerja adalah nyaris-nyaris maut. Seterusnya pemohon memberitahu tempat pemunggahan kelapa sawit tidak lama lagi akan diambil alih oleh JPS untuk dijadikan ban JPS dan pemohon merasakan tempat pemunggahan hasil di seberang sungai tiada lagi pada masa akan datang. Oleh yang demikian, laluan sungai sama sekali tidak boleh digunakan.

The third defendant in his affidavit in reply (encl 11) has stated, inter alia, as follows:

> (9) (i) Saya menegaskan bahawa, sebelum ini, defendan ketiga telah menggunakan bot-bot melalui Sungai Perak untuk membawa hasil kelapa sawit dari ladangnya ke kilang kelapa sawit.
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> (ii) Perjalanan lalu-lintas menerusi bot-bot melalui Sungai Perak adalah dinyatakan oleh plaintif sebagai lalu-lintas alternatif.
>
> (iii) Perjalanan lalu-lintas menerusi Sungai Perak berisiko tinggi dan ia boleh membahayakan nyawa pengemudi-pengemudi bot dan pekerja-pekerja defendan ketiga.
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> (iv) Saya telah dinasihati dan sesungguhnya percaya bahawa perjalanan lalu-lintas alternatif iaitu menerusi bot-bot melalui Sungai Perak bukanlah suatu lalu-lintas yang munasabah dan adalah berisiko tinggi.
>
> (10) Saya telah dinasihati dan sesungguhnya percaya bahawa permohonan untuk suatu hak lalu-lintas dibuat oleh defendan ketiga bukanlah hanya sekadar untuk menyenangkan perjalanan defendan ketiga tetapi hak lalu-lintas itu adalah perlu dan mustahak kerana hartanah defendan ketiga adalah 'land locked'.

The first defendant in his affidavit in reply (encl 7) has stated, inter alia, as follows:

> 21 Saya pohon izin mahkamah merujuk kepada ekshibit plaintif 'LKD-6'' dan telah dinasihatkan dan percaya jalan-jalan alternatif yang sedia ada merupakan jalan mati, oleh yang sedemikian satu hak lalulalang perlu diwujudkan.

It would appear that different versions have been advanced regarding whether there was an alternative route. The first version as disclosed in the notes of the enquiry is that Sungei Perak is hazardous because on two occasions, the third defendant's sampan capsized causing all the produce to fall into the river and its workers also nearly lost their lives. The third defendant was also told that the place for the loading of its produce along Sungei Perak would be taken over by the JPS and converted into a JPS bund thereby resulting in the third defendant being unable to make use of Sungei Perak anymore. The second version as disclosed in the third defendant's affidavit in reply is that Sungei Perak is too hazardous to be used as an alternative route because it endangers the lives of the captains of its boats

and its workers and that the right of way is important and necessary because its land is 'land locked'. The third version as disclosed in the first defendant's affidavit in reply as set out above is that the existing routes are dead ends and therefore it was necessary for a right of way to be created.

In the opinion of the court, the evidence adduced at the enquiry and contained in the affidavits in reply of the three defendants is insufficient to show that Sungei Perak cannot be used as an alternative right of way. No other witnesses were called by the third defendant to support the third defendant's assertions. The third defendant's sampan could have capsized because it was overloaded or because the captain steering it did not possess the necessary skill or was negligent. There was also no one from the JPS who was called to state whether Sungei Perak was indeed as dangerous as claimed by the third defendant. Similarly, no one from the JPS was called to confirm whether the loading area of the third defendant along the Sungei Perak was going to be taken over by the JPS in order to be converted into a JPS bund and if so when. Bearing in mind the principle of inviolateness of land, it is clear from s 390(2) of the NLC that it is incumbent on the first defendant to either hold an enquiry or make such other investigation as he thinks appropriate upon receiving an application for a private right of way. Although it is left to the first defendant to choose either one or the other mode of satisfying himself, once he has chosen, he has a duty to ensure that the enquiry or such other investigation is carried out properly so that its purpose as set out in the law is achieved.

Furthermore, I do not see how the third defendant's land can be said to be landlocked when it clearly adjoins Sungei Perak.

In the absence of compelling evidence, the court was not satisfied that Sungei Perak was not an alternative route in the sense that it was not possible, practical nor easily available to the third defendant. On the contrary, the court was satisfied that it constituted an existing reasonable alternative route and that the third defendant merely wanted the right of way because it was more convenient for its workers to transport its oil palm produce using lorries as a mode of transportation as opposed to using sampans which would require a different kind of skill to operate.

In *Si Rusa*'s case, Peh Swee Chin J (as he then was) had issued the following warning:

> Next, was it reasonable in the circumstances to grant the private right of way? In *Liew Peck Lian*'s case, it was held that 'reasonably' did not mean 'conveniently'. With respect I agree, for were it otherwise, the floodgates would definitely be opened for similar application in future; possibly made with complete abandon. There must be something more than just mere inconvenience or convenience; some situation that partakes of gravity or urgent necessity.

Applying that principle to the facts of the present case, the court was of the considered view that the situation in the present case did not partake 'of gravity or cogent necessity'. The court was further of the view that the third defendant had failed to discharge this onus at the enquiry. I am further of

the view that in the absence of compelling evidence that the existing public terminal, which is Sungei Perak, is dangerous and therefore cannot rightfully be described as a public terminal, the first defendant was acting ultra vires s 390 read together with ss 389(3) and 387 of the NLC when he made the order because s 389(3) expressly provides as follows:

> (3) A private right of way created for the benefit of the proprietor or occupier of alienated land shall authorise the proprietor or occupier, as the case may be, and persons acting with the express or implied consent of the proprietor or occupier to pass and re-pass between the land and a public terminal.

and s 387 of the NLC defines 'public terminal' as follows:

> 'public terminal' means the foreshore, or a river, railway station or public road.'

It is not disputed that the third defendant's land adjoins a river, namely, Sungei Perak. Therefore, the question of the first defendant creating a private right of way across the plaintiff's land in order to enable the third defendant, its agents and servants to pass and repass between the third defendant's land and the JPS bund which is a public terminal cannot arise at all.

Third issue: Whether the undisputed fact that three plans were given to the plaintiff, one after the other, by the first defendant showed that the three defendants were acting in concert to force the right of way upon the plaintiff?

It was not denied by the first defendant that three plans were sent to the plaintiff, one after the other, for the latter's comments before the order was made. According to the first defendant, this was done as part of a normal practice in order to enable the first defendant to reach a correct decision. The plaintiff, however, is none too happy because it has been put to expense and time. The sentiments and unhappiness of the plaintiff are clearly mirrored in the three letters sent to the first defendant and exhibited in the plaintiff's supporting affidavit as 'LKD-7', 'LKD-11' and 'LKD-14'.

The three plans, are exhibited in the plaintiff's supporting affidavit as 'LKD-5' ('the first plan'), 'LKD-10' ('the second plan') and 'LKD-13' ('the third plan'). The plaintiff has also exhibited its own plan as 'LKD-6' ('the plaintiff's plan'). The plaintiff was informed that the first plan showed that the proposed right of way would pass and repass between the plaintiff's land and a JPS bund and subsequently to a public terminal which is a public road. The plaintiff was also informed that the right of way requested was on an existing straight road on the land. Upon the objections of the plaintiff to the first plan, the first defendant proposed to rely on the second plan which involved more than one title and ran across the plaintiff's whole estate instead of only one piece of land. Upon the objections of the plaintiff, the first defendant retracted the second plan and sent to the plaintiff for its objections and views the third plan which involved only one piece of land. As this was becoming a habit, the plaintiff vide their solicitor's letter dated 9 February 1998 requested the first defendant to confirm that the third plan

was going to be the final plan and that it would not be retracted before the plaintiff would give its views. However, this letter remained unanswered by the first defendant and to the plaintiff's own prejudice, the first defendant granted the third defendant the right of way as per the contents of the third plan.

In the opinion of the court, although the first defendant was entitled, in accordance with s 390(2)(a) of the NLC, to endeavour to find and create a suitable right of way over the plaintiff's land for the benefit of the third defendant and in that process to abandon any plan if found to be unsuitable and to rely on another plan or other plans, and the costs incurred to be borne by the third defendant who is the applicant, the plaintiff should be given every opportunity to object and present its view before the proposed route in the plan is approved.

After comparing the third plan with the plaintiff's plan, the court was of the view that the third plan involved the creation of an additional stretch of road which would involve the plaintiff having to concede a certain portion of its oil palm fields for the creation of the additional stretch and this was never dealt with by the first defendant at the enquiry including the question of compensation and, therefore, the order should be set aside.

Be that as it may, the court was of the opinion that there was insufficient material placed before the court by the plaintiff to enable the court to hold that the three defendants were acting in concert to force the right of way on the plaintiff as alleged by the plaintiff purely on the ground that the first defendant had sent to the plaintiff, three plans in succession, one after another, for the plaintiff's consideration and views. On the contrary, it would appear to the court that the first defendant had acted in the way he did in his efforts to find a route which would be agreeable to the plaintiff. Nevertheless, such an allegation could have been avoided had the first defendant given detailed reasons to explain why he had acted in such a manner.

Fourth issue: Whether the failure of the first defendant to give his grounds for the making of the order rendered the order suspicious and, therefore, bad?

It was not disputed that the first defendant did not give any reasons as to why he had made the order other than to state in the order that he was satisfied based on the evidence adduced at the enquiry that it was expedient to grant the right of way to the third defendant and to state in para 21 of his affidavit in reply that he was advised and verily believe that the alternative routes were dead-ends and that, therefore, out of sheer necessity a right of way had to be created.

In *Liew Peck Lian*'s case, Adams J had held that the collector should have given detailed reasons as to why he had considered that the two other access routes were not in fact 'access otherwise reasonably available' because the grant of a right of way in perpetuity is an infraction of the right of a private owner to use his land as he likes and that therefore, it must be a condition precedent to such a grant that a very good reason exists for so granting and that the statement that the land is swampy is by itself not

A sufficient. The relevant exerpt appears on p 118 and is reproduced below for ease of reference:

> Since what the Conservator of Forests asks will establish if granted a right of way running with the appellants' land in perpetuity whereas the extraction of the timber will only take $2^{1}/_{2}$ years and since this is an infraction of the right of
B a private owner to use his land as he likes, it must be a condition precedent to such a grant that a very good reason exists for so granting. The facts, for example, that it would be very expensive for the timber licensee not to grant the right of way or more convenient for the timber licensee, are irrelevant. If it is not unreasonable or impossible to use existing facilities or to make other access, in my opinion such a grant should not be made. There is no evidence
C here to show either that the suggestion and offer made by the appellants along the southern boundary AO.751 and 753 is not possible nor is there any evidence to show that the access between Dr Salleh's land and AO 708 & MLO 588, is also not possible. The statement that the land is swampy is by itself not sufficient. The Collector should have considered the proposals in detail and should have given detailed reasons as to why he considered that
D the two other access routes are not in fact 'access otherwise reasonably available'. He has not done this. He appears to have acted on the assumption that, as the alternate routes are inconvenient, to the licensee that is sufficient to grant an easement running with the land over the appellants' property. This is not so. I think the Collector has misdirected himself as to what the term 'access is not otherwise reasonably available' means and I therefore allow the appeal.

E

I share his views. In my opinion, the first defendant has misdirected himself as to what the term 'expedient for a private right of way to be created' means. He went on the assumption that all that was required to establish that term was the bare statement from the third defendant that Sungei
F Perak was a dangerous route because its sampan had capsized twice causing its produce to fall into the river and endangering the lives of its captains and workers. The failure to give detailed reasons, in this case, also renders the order suspicious and, therefore, bad because there were three different versions which were advanced as to why the order was made as was mentioned in para 22 above.

G

Fifth issue: Whether the first defendant had failed to take relevant matters into consideration and in the process failed to exercise his discretion properly?

According to the plaintiff, it had informed the first defendant during the enquiry that because the plaintiff and the third defendant were both
H operating oil palm estates on their respective lands with the plaintiff's land measuring about 750 acres and the third defendant's land measuring about 100 acres, problems of security of the plaintiff's oil palm fruits would arise because the system for the collection of the fruits entailed the fruits being left in piles along the road while awaiting collection and transportation by its lorries. Such a situation would give rise to the risk of loss of the fruits
I through theft and when that happens, the question of compensation for such loss would arise. Although the fears of the plaintiff were recorded by the first defendant in the notes of the enquiry, the first defendant has not

stated anywhere in his affidavit in reply (encl 7) that he had considered these matters before making the order.

In the opinion of the court, these are relevant matters which should have been considered by the first defendant before making the order. Since it was not done, the court was of the opinion that the failure of the first defendant to do so had resulted in the first defendant failing to exercise his discretion properly and, therefore, the order was bad and should be set aside.

Sixth issue: Whether the first defendant had failed to observe the rules of natural justice by not giving the plaintiff a right to be heard when he failed to ask the plaintiff for its views about the proposed route as set out in the order before making the order

According to the plaintiff, it was not given an opportunity to voice its views about the proposed route as set out in the order during the enquiry and therefore, there has been a breach of the rules of natural justice. A scrutiny of the circumstances surrounding the grant of the order, in particular, the route identified in the accompanying plan to the order marked 24A showed that the route was similar to the proposed route in the third plan which was sent to the plaintiff vide the first defendant's letter dated 14 January 1999 after the enquiry was completed on 15 October 1998. The letter reads as follows:

> Pejabat Daerah dan Tanah,
> Hilir Perak,
> 36009 Teluk Intan
>
> Ruj Tuan: JWC/8063/87/K
> Ruj Kami: Bil (23) dlm PTRP. 9/877
>
> Tarikh; 14 Januari 1999
>
> Tetuan Concisom & Co,
> Peguambela dan Peguamcara,
> No 2, Jalan Seenivasagam,
> 30450 Ipoh.
>
> Tetuan,
>
> Permohonan Hak Lalu-lalang Di Atas Tanah GB. 15994 Lot 1616 Mukim Durian Sebatang (Lot 62412)
>
> Adalah merujuk perkara di atas, sukacita saya mengemukakan bersama-sama ini pelan terbaru yang menunjukkan hak lalu-lalang yang sebenarnya dipohon di atas Lot 16412 (satu lot sahaja) seperti ditanda berwarna kuning di atas pelan.
>
> 2 Pelan terawal yang dikemukakan kepada tuan melalui surat saya di Bil (28) sesiri bertarikh 21 November 1998 adalah dengan ini dibatalkan.
>
> 3 Tetuan diberi 14 hari dari tarikhsurat ini untuk memaklumkan ke pejabat ini apa komen dan anggaran perbelanjaan yang dikeluarkan oleh anak guam tetuan membina jalan tersebut.

4 Jika tetuan gagal mengemukakan laporan tersebut dalam masa yang ditetapkan maka pentadbiran ini akan membuat keputusan sewajarnya.

Sekianlah dimaklumkan dan terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

tt
(ABDUL MAHAP BIN ISMAIL, PPT)
b/p Pentadbir Tanah
Hilir Perak

As stated earlier, the plaintiff refused to respond to the above letter because it was concerned with the issue of finality of the plans submitted and had asked for confirmation whether it was the final plan. However, neither the contents nor the tone of the plaintiff's reply to the above letter found favour with the first defendant who then went on to make the order on 30 January 1999, that is some 16 days after the date of his letter as set out above. The question that arose for the determination of the court was whether it was open to the first defendant to subsequently go ahead and make his order upon the refusal of the plaintiff to respond by giving its views. Having considered the unchallenged evidence that the enquiry which had commenced on 30 September 1998 had ended on 15 October 1998 and the first defendant had cancelled the second plan which had formed the basis of the enquiry, the court was of the opinion that the enquiry should have been reopened or a new enquiry held to enable the plaintiff to give its views on the proposed route as set out in the third plan before the first defendant made the final order. The failure to do so constituted a breach of one of the rules of natural justice, that is, the right to be heard or audi alteram partem, and consequently, the order was bad because the plaintiff was not given a fair hearing. It is trite law that the statutory enquiry is the standard device for giving a fair hearing to objectors before the final decision is made on some question of government policy affecting citizens' rights or interests, the primary objectives of which are to make sure that the best possible decision is made in the public interest and that the citizen has his objections fairly considered. Since the first defendant had cancelled two plans before and in view of the refusal of the plaintiff to respond to the third plan unless and until it was given an assurance by the first defendant that the third plan would be the final plan, the first defendant should have impressed upon the plaintiff that he was at liberty to send as many plans as he felt was necessary to the plaintiff for the latter's comments subject to the costs thereof being borne by the third defendant by replying to that effect to the plaintiff and setting a date for the holding of a new enquiry or reopening the enquiry which was concluded on 15 October 1998. Had this been done and had the plaintiff refused to attend the enquiry, there would have been no breach of the rules of natural justice because the plaintiff would have been given the opportunity of a fair hearing but he chose not to take advantage of it.

In the premises, the court allowed the plaintiff's appeal with costs and set aside the order.

Order accordingly.

Reported by Benjamin Yong. End of Volume 5